

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2018

To be argued by

RICHARD T. FARRELL

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 77-2018

MICHAEL J. MURELLO,

Appellant,

-against-

THE SUPREME COURT, STATE OF NEW YORK
COUNTY OF KINGS; and THE HON. EUGENE
GOLD, DISTRICT ATTORNEY, KINGS COUNTY,

Appellees.

BRIEF FOR APPELLANT

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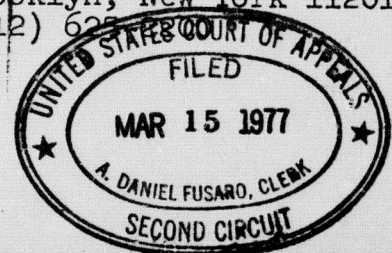


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-against-

THE SUPREME COURT, STATE OF NEW YORK,
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Appellees.

BRIEF FOR THE APPELLANT

Preliminary Statement

Michael J. Murello appeals from a final judgment, entered January 19, 1977, in the District Court for the Eastern District of New York (Neaher, J.) (A.45)*, dismissing Murello's petition for a writ of habeas corpus seeking to relieve Murello of an illegal conviction and sentence imposed upon him by the State of New York in violation of an implicit plea bargaining understanding. Judge Neaher signed a certificate of probable cause on January 28, 1977.

Statement of Facts

A. Introduction

This case raises issues of substantial importance to the administration of justice in so far as that system relies on effective plea bargaining procedures.

* Unless otherwise indicated numbers in parentheses refer to pages in the Appendix.

The principal issue raised here is whether it is a violation of due process for a sentencing judge in a plea bargain situation to deny a request of the defendant to withdraw his plea of guilty and return to the status quo ante when it appears that the promised disposition cannot be made because of intervening circumstances.

B. Facts of the Case

On June 29, 1973, Murello was convicted upon his pleas of guilty in the New York Supreme Court, Kings County of the misdemeanor of possession of untaxed cigarettes for sale purposes and was sentenced to two consecutive one year sentences. (A16-19). Before sentencing was imposed, the trial court denied Murello's application to withdraw the guilty pleas (A-13 and 21-23). On appeal to the New York Appellate Division, the judgment of the trial court was unanimously affirmed without opinion, 47 A.D.2d 528 (2d Dep't, 1975). The New York Court of Appeals affirmed on June 3, 1976 in a memorandum decision, 39 N.Y.2d 879. Murello's application to the United States District Court, Eastern District of New York for a writ of habeas corpus was dismissed on January 18, 1977 (Neaher, J.) (A-45-48).

Murello had been twice indicted for possession of untaxed cigarettes as a felony. On January 29, 1973, Mr. Justice Titone in New York Supreme Court, Kings County, permitted Murello to withdraw his earlier pleas of not guilty to misdemeanor possession on each indictment (A-24-28 and 34-38). After accepting the plea on each indictment, Justice Titone asked Murello for the record whether any threats or promises had been made to him by the

District Attorney, any officer of the court, or the court itself and Murello answered in the negative (A-27 and 37).

On May 18, 1973, Murello appeared before Mr. Justice Titone for sentencing. At that time, counsel moved to withdraw the pleas entered on January 29, 1973 (A-21-23).

When the guilty pleas were taken there had in fact been a promise by Mr. Justice Titone to sentence Murello to probation and to impose a fine, and not to incarcerate him, provided that Murello not be arrested before the imposition of sentence (Id.). Murello was not aware of the condition attached to the promise of probation and fine. His guilty plea was only in exchange for probation and fine (A-8-10).

As it appears, Murello was arrested sometime between January 29th and May 18th, 1973 (A-21).

During the proceedings on May 18th, counsel asked the court to disregard the fact of the mesne arrest and "still consider placing him on probation with a fine" (A-21-22). The court responded: "This man is not probation material. I'm not going to allow him to withdraw his plea" (A-22). Counsel thereupon informed the court that the defendant wished to withdraw his pleas, and the court replied: "When I took the plea, I took it, and I stated on the record, if there were any subsequent arrests, that there would be no probationary period, he still gets a misdemeanor. I'm not going to allow him to withdraw his plea. Is he ready for sentencing, or does he want an adjournment for sentencing?" (A-22). The matter was adjourned.

Murello informed the court that he was innocent of the charges which were the subject of his meale arrest (A-21).

Nowhere in the minutes of January 29, 1973, does any reference appear to a promised disposition in return for the pleas taken. From the remarks both of Mr. Justice Titone (A-13, 17, 23) and Murello's counsel (A-12-13, 21-22), the record demonstrates that a promise had in fact been made, notwithstanding Murello's replies to the court's questions during the plea proceedings (A-26-27, 31). On June 29, 1973, Murello appeared before Mr. Justice Titone for sentencing. Counsel renewed the application to withdraw the guilty pleas (A-13). The application was again denied (A-13). During the colloquy before imposition of sentence, counsel reminded Mr. Justice Titone that the other matter was merely an accusation and prayed for leniency (A-15).

The court imposed consecutive one year sentences, and culminated the proceeding with the following: "I took a plea. I promised him probation if he wouldn't get in trouble. They don't deserve chances after that" (A-17-18).

C. Effect of the Court's Refusal to Allow the Guilty Pleas to be Withdrawn

Murello's rights to due process were violated by the refusal of the trial judge to permit him to withdraw his guilty pleas. When the court found that the promised disposition could not be made because of intervening circumstances, we shall proceed to show that the law requires that the defendant be allowed to withdraw his plea of guilty and return to the status quo ante, that is to proceed to trial on a plea of not guilty. The error

committed in this case can be corrected by reversal at this stage so that fairness should remain a principle governing every aspect of plea bargaining. In our case fairness requires that a defendant be accorded the right to enforce the terms of the agreement which induced his plea of guilty, absent fraud, or the right to withdraw his plea.

D. Exhaustion

Murello has exhausted all available state remedies by appealing his conviction to the New York Appellate Division, which affirmed his sentence without opinion, 47 A.D.2d 528 (2d Dep't, 1975), and by appealing the order of the Appellate Division to the New York Court of Appeals, which affirmed on June 3, 1976, 39 N.Y.2d 879. The issue raised in the present application was raised in the New York Court.

POINT I

THE NEW YORK STATE COURTS IMPROPERLY REFUSED
TO GRANT MURELLO'S TIMELY APPLICATION TO
WITHDRAW THE PLEA OF GUILTY.

The record in this case amply demonstrates that the New York State trial judge (Judge Titone) himself had promised Murello probation and fine in exchange for his pleas of guilty (A-22, 12-13, 17).^{*} Because events intervening between the taking of the plea, to wit, Murello's arrest and indictment on a charge similar to those on which the plea bargain was based, the trial judge informed petitioner that the deal was off (A-22). Judge Titone denied petitioner's repeated applications to withdraw the guilty plea (A-13, 20) and sentenced petitioner to consecutive one year sentences (A-16-17).

The granting of a writ of habeas corpus is required here because of the decision in Santobello v. New York, 404 U.S. 257 (1971); because of the teaching of both the American Bar Association (American Bar Association Projection Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty, §§2.1(a)(ii)(5); 3.3(b), and Standards Relation to the Function of the Trial Judge, §4.1(c)(iii)[1968]) and the American Law Institute (American Law Institute Model Code of Pre-Arrest Procedure, §350.6 [Tent. Draft No. 5, 1972]); and the great weight of authority.

* Unless otherwise indicated numbers in parentheses refer to pages in the Appendix.

First, the Santobello reason for granting the writ in this case.

In Santobello the prosecutor originally made a promise that he would not recommend a prison sentence upon the guilty pleading defendant. But between plea and sentence, the prosecutor's office decided it could not honor the promise and recommended maximum prison sentence. The trial judge imposed the maximum sentence. On writ of certiorari the United States Supreme Court vacated the New York State court judgment and remanded the case to the State courts to consider whether the circumstances in the case require that there be specific performance of the agreement on the plea or that the petitioner be allowed to withdraw his plea of guilty (404 U.S. 257, 263).

Chief Justice Burger, in Santobello, observed "that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." (404 U.S. at 262). For the purpose of applying the Santobello decision to the case at hand, the failure of a trial judge to keep a promise which induced a defendant to plead guilty should have the same consequences as those which Santobello mandates where the prosecutor fails to keep such a promise, that is vacation of the guilty plea or specific performance of the promise at the discretion of the State court.* Indeed the New York State Court of Appeals has so concluded (People v. Selikoff, 35 N.Y.2d 227 at 241 (1974); cert. den. 419 U.S. 1122).

* Here Murello requests only that he be allowed to withdraw his guilty plea. If the court decides to allow Murello to withdraw his plea, the case may proceed on the basis of a plea of not guilty to the indictments.

In light of the decision in Santobello and its modification by the New York Court of Appeals (see People v. Selikoff, supra), the following rule appears to be the law:

If the trial judge promises a certain disposition in exchange for the defendant's plea of guilty, and it later develops that the court cannot properly keep the promise, then the court must at least allow defendant to withdraw the guilty plea. (See United States ex rel. Selikoff v. Comm. of Corr., 524 F.2d 650 [2d Cir. 1975]).

Application of the above principles to this case requires that the matter be remanded to the Supreme Court, Kings County with directions that the plea be vacated and the case proceed on the basis of a plea of not guilty to the indictments sought to have been compromised by the pleas of guilty. Consider the following:

In Santobello, there was a promise of no incarceration,

In this case there was a promise of no incarceration;

In Santobello, it was subsequently decided that the original promise should not be kept,

In this case, defendant's arrest and indictment on other charges convinced the trial judge that the

original promise should not be kept;

In Santobello, the United States Supreme Court remanded the case for specific performance of the original promise or vacation of the guilty plea,

In this case, the trial judge refused to let the defendant withdraw the plea.

Fact matching of Santobello and this case shows only one significant difference. Appellant Murello did not get what Santobello got, and Murello wanted only what Selikoff was at minimum entitled to, to wit, the right to withdraw the plea. The refusal to grant the petitioner's application to withdraw the plea was error in the state courts and must be remedied here.

We strongly argue that the Santobello and Selikoff cases are apposite despite the contrary opinion by Judge Neaher below. Judge Neaher appeared to contend that the present case is distinguishable in that the breach of the agreement was by the defendant rather than by the judge or prosecutor. We read these cases as stating that the agreement or promises refer to the sentence to be imposed in exchange for the guilty plea. Defendant's promise was to plead guilty in exchange for probation and a fine, which promise was never breached. If in fact Murello had knowledge of the caveat to "stay out of trouble" that condition affected the whole agreement so that when the trial judge withdrew his part of the bargain, Murello could withdraw his guilty plea. Murello's guilty plea was as much on condition of receiving the stated disposition as the trial judge's agreement was agreement was conditioned on Murello's good behavior.

The second reason to grant the writ of habeas corpus here is supplied by the American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty, §§2.1(a)(11)(5); 3.3(b) and Standards Relating to the

Function of the Trial Judge, §4.1(c)(iii)[1968]. The apposite standards relating to pleas of guilty provide, in material part:

§2.1 Plea withdrawal.

(i) The court should allow the defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.

(ii) Withdrawal is necessary to correct a manifest injustice whenever the defendant proves that: . . .

(5) he did not receive the charge or sentence concessions contemplated by the plea agreement concurred in by the court, and he did not affirm his plea after being advised that the court no longer concurred and being called upon to either affirm or withdraw his plea.

(iii) The defendant may move for withdrawal of his plea without alleging that he is innocent of the charge to which the plea has been entered. . .

§3.3 Responsibilities of the trial judge.

(a) The trial judge should not participate in plea discussions.

(b) If a tentative plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that other charges before that court will be dismissed or that sentence concession will be granted, upon request of the parties the trial judge may permit the disclosure to him of the tentative agreement and the reasons therefore in advance of the time for tender of the plea. He may then indicate to the prosecuting attorney and defense counsel whether he will concur in the proposed disposition if the information in the presentence report is consistent with the representations made to him. If the trial judge concurs, but later decides that the final disposition should not include the charge or sentence concessions contemplated by the plea agreement, he shall so advise the defendant and then call upon the defendant to either affirm or withdraw his plea of guilty or nolo contendere. . .

Section 4.1 of the A.B.A. Standards relating to the function of the trial judge provides:

§4.1 Role of the judge in plea discussions and plea agreements.

(a) The trial judge should not be involved with plea discussions before the parties have reached an agreement other than to facilitate fulfillment of the obligation of the prosecutor and defense counsel to explore with each other the possibility of disposition without trial. . .

(c) If the plea agreement contemplates the granting of charge or sentence concessions by the trial judge, he should:

(iii) permit withdrawal of the plea (or, if it has not yet been accepted, withdrawal of the tender of the plea) in any case in which the judge determines not to grant the charge or sentence concessions contemplated by the agreement.

The ABA standards just cited point to the same rule as that found in Santobello v. New York (supra, 404 U.S. 257), i.e., if a guilty-pleading defendant is not going to get what was promised, then the defendant shall at least be allowed to withdraw his plea. The amendments recommended by the Special Committee on Minimum Standards for the Administration of Criminal Justice (Hon. J. Edward Lumbard, Chairman, March 1968) contains the following observation in connection with this matter:

Under the proposed change to section 3.3(b), if the trial judge later changes his mind, he must inform the defendant of this fact and provide the defendant with an opportunity to withdraw his plea. The basis for the proposed change is that even though the prior concurrence of the trial judge was conditional, so that strictly speaking his later decision on final disposition is not contradictory, it nonetheless seems fair to give the defendant an opportunity to withdraw his plea. If the judge were not to give the defendant this chance, but instead held the defendant to his plea and refused to grant the concessions contemplated in the plea agreement, the defendant would probably believe that he had been dealt with unfairly. There are obvious reasons, from a correctional standpoint, why a defendant should be satisfied that he was treated fairly when he arrives at the penitentiary. It should be noted that such a situation will only arise when the judge chooses to give advance notice as to his concurrence in the agreement. When he does so, it is believed that the occasions in which he finds need to change his mind will be exceedingly rara.

Consonant with the rule of the Santobello case, and the principles of the American Bar Association Minimum Standards just

quoted, are the provisions of the American Law Institute Model Code of Prearrest Procedure, §350.6 (Tent. Draft No. 5, 1972) which provides:

If, at the time of sentencing, the court for any reason determines to impose a sentence more severe than that provided for in a plea agreement between the parties, the court shall inform the defendant of that fact and shall inform the defendant that the court will entertain a motion to withdraw the guilty plea. The court after pronouncing the sentence of a defendant who has pleaded guilty or nolo contendere shall inquire of the defendant personally whether the sentence pronounced violates any agreement or understanding the defendant had with respect to the sentence. If the court determines that the sentence pronounced is inconsistent with an agreement, or that it differs from the defendant's understanding in such a way that it would be unjust to permit the defendant's plea to stand, it shall vacate the plea.

The rationale behind the ALI proposal is provided in the following from the note on §350.6:

This section directs the court to vacate the defendant's guilty plea if at the time of sentencing it decides it cannot sentence the defendant in accordance with the agreement. See, e.g., United States ex rel. Elksnis v. Gilligan, 256 F.Supp. 244 (S.D.N.Y.) 1966). On the basis of a suggestion at the Advisory Committee meeting, the first sentence has been revised to permit the judge to entertain a motion to vacate rather than providing for automatic vacating of the plea in the event of a more severe sentence. This may save time in those cases in which the defendant is prepared to plead guilty notwithstanding the change. . .

Based on all the foregoing, one conclusion, and only one conclusion flows: petitioner Murello should have been allowed to withdraw his plea as his attorney asked. Since this timely application was denied, this Court must grant a writ of habeas corpus and send the matter back for proceedings upon the original indictments, to which the original pleas of not guilty apply.

The weight of authority clearly supports the rule argued for in this case: If the plea of guilty is entered in reliance upon a promised disposition, and the trial judge determines that the promised disposition cannot properly be made, then the defendant must be given at least the opportunity to withdraw his plea.

In People v. Reibe (40 Ill.2d 565, 241 N.E.2d 313, 314-315 [1968]) the court, per Schaeffer, J., made the following observations:

"The trial judge participated in the negotiations that preceded the plea of guilty, and at that time stated that the minimum sentences would be "in the area" of the minimum sentences agreeable to the prosecution and the defense, that is, in the area of twenty years. When the trial judge thereafter changed his mind, and was no longer willing to impose minimum sentences of that duration, fairness required that he so inform the defendant and afford him an opportunity to withdraw his plea of guilty. See, A.B.A. Minimum Standards for the Administration of Criminal Justice: Pleas of Guilty, Revised Standards 3.3, 2.1."

Riebe was followed in People v. Palma (25 Mich. App. 682, 181 N.W. 2d 808, 810 [1970]) where the court, citing Riebe said: "When the judge realized that he could not grant leniency because of subsequent convictions, recent well-reasoned authority suggests that he had a duty to so inform the defendant and give him an opportunity to withdraw his guilty plea."

The general American rule on the subject is summed up in Commonwealth v. Barrett (223 Pa.Super. 163, 299 A.2d 30, 32-33 [1972]):

"The majority of jurisdictions that have faced this issue permit the withdrawal of a guilty plea when a plea bargained is not kept. See, e.g., White v. Gaffney, 435 F.2d 1241 (10th Cir. 1970); People v. Fratianno, 6 Cal. App. 3d 211, 85 Cal.Rptr. 755

(1970); State v. Wolske, 280 Minn. 465, 160 N.W.2d 146 (1968); People v. Sigafus, 39 Ill.2d 68, 233 N.E.2d 386 (1968). This Court in Commonwealth v. Todd, 186 Pa.Super.272, 278, 142 A.2d 174 (1958), held that it was reversible error for the trial judge to deny appellant's withdrawal of his guilty pleas, where it was entered pursuant to an agreement."

See also: People v. Griffith (43 A.D.2d 20 [1st Dep't 1973]); Quintana v. Robinson (31 Conn.Sup. 22, 319 A.2d 515, 518 [1973]); State v. Fisher (223 N.W.2d 243 [Iowa, 1974]); State v. Farris (320 A.2d 642 [N.H., 1974]); State v. Theurer (118 N.J. Super. 485, 288 A.2d 587 [1972]); Commonwealth v. Dickerson (449 Pa. 70 295 A.2d 282 [1972]); Commonwealth v. Evans (434 Pa. 52, 252 A.2d 689 [1969]); United States ex rel. Culbreath v. Rundle (466 F.2d 730 [3d Cir. 1972]); Proposed Amendments to Criminal Rules, 52 F.R.D. 409, 429-431 (1971).

Direct participation by the Trial Judge in arriving at the plea bargain has been roundly condemned elsewhere, see A.B.A. Standards quoted above and People v. Clark (515 P.2d 1242 [Colo. 1973]); Commonwealth v. Sanutti (454 Pa. 344, 312 A.2d 42 [1973]); Farrar v. State (52 Wis. 2d 651, 191 N.W.2d 214 [1971]); Rahhal v. State (52 Wis.2d 144, 187 N.W.2d 800 [1971]); Young v. State (49 Wis. 2d 361, 182 N.W.2d 262 [1971]).

In sum, we ask this Court to adopt the salubrious principles articulated in People v. Griffith (43 A.D.2d 20, 26, 349 N.Y.S.2d 94, 100):

"Guilty pleas should be encouraged, but the judicial function should be limited to determining: that its acceptance is in the public interest and receiving assurance from the defendant that he understands the nature of the plea; that the plea is freely and voluntarily made with full knowledge of the constitutional rights defendant is thereby

waiving; that defendant committed the acts to which he is pleading guilty (or is knowingly and intelligently willing to plead guilty, without an express admission of guilt, to avoid the consequences of a conviction [cf. North Carolina v. Alford, 400 U.S.25]); and that no promises by way of inducement have been made to defendant by his lawyer, the District Attorney, the court or anyone else other than those clearly and fully spread on the record. The only suggested deviation from the A.B.A. standard is that if a sentence agreement is part of the bargain struck, the Judge should carefully advise the defendant that he is not bound by any such recommendation and that if he cannot impose the recommended sentence, after receipt and examination of the presentence report, defendant would be permitted to withdraw his plea if he then disagreed with the court's proposed sentence. While we recognize the risks inherent in even this limited judicial participation (see, e.g., United States ex rel. Elksnis v. Gilligan, 256 F. Supp. 244, 254-255; American Bar Association Standards, supra, p. 73), we must give consideration to currently prevailing practices and the little likelihood of any agreements being reached without such stipulation."

Application of these principles requires reversing the judgment of the District Court and granting the writ of habeas corpus here.

The particular vice of direct judicial participation in the plea bargaining process is that the Judge brings to bear, by inference if not in fact, the majesty of the office upon the defendant's decision whether to plead or not. See cases cited above and: People v. Clark (515 P.2d 1242 [Colo.1973]); State v. Wolske (280 Minn. 465, 160 N.W.2d 146 [1968]); Machibroda v. United States (368 U.S. 487, 510 [1962]); Brown v. Peyton (435 F. 2d 1352 [4th Cir. 1970]); see also, United States v. Frontero (452 F.2d 406 [5th Cir. 1971]); Lassiter v. Turner (423 F.2d 897 [4th Cir. 1970]); Bailey v. MacDougall (392 F.2d 155 [4th Cir. 1968]); Brown v. Beto (377 F.2d 950 [5th Cir. 1967]).

Ample state and federal authority establish that absent prejudice to the prosecution, withdrawal of pleas of guilty should be liberally allowed if withdrawal is sought before sentence is imposed; see generally, Commonwealth v. Sanutti (454 Pa. 344, 312 A.2d 42 [1973]); Commonwealth v. Woods (452 Pa. 546, 307 A.2d 880 [1973]); Commonwealth v. Evans (434 Pa. 52, 252 A.2d 689 [1969]); Libke v. State (60 Wis. 2d 121, 208 N.W.2d 331 [1973]); United States v. Tabory (462 F.2d 352 [4th Cir. 1972]); United States v. Harvey (463 F.2d 1022 [4th Cir. 1972]); United States ex rel. Culbreath v. Rundle (466 F.2d 730 [3d Cir. 1972]); Fed. Rule Crim. Proc. 32(d); see Wright, Federal Practice and Procedure §538.

POINT II

PLEA BARGAINING IS AN "ESSENTIAL COMPONENT OF THE ADMINISTRATION OF JUSTICE". ITS ROLE IS SEVERELY UNDERMINED WHEN THE JUDICIAL SYSTEM SANCTIONS THE VIEW THAT THE TRIAL JUDGE MAY BREAK THE BARGAIN AND IMPOSE AN UNBARGAINED FOR SENTENCE ON THE GUILTY PLEADING DEFENDANT.

In Santobello v. New York, 404 U.S.257 at 260, Chief Justice Burger spoke favorably of plea bargaining, recognizing it as "as essential component of the administration of justice. Properly administered, it should be encouraged."

Recently, this Court in Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976), affirmed a district court decision granting specific performance of the promise made by the prosecutor. While the premise of the breaking of an unfulfillable promise relating to incarceration by the prosecutor in the Palermo case is not the same as the situation in our case where the trial judge failed to keep his promise as to incarceration due to intervening circumstances, nevertheless some of the reasoning used in the Palermo decision is applicable here because the decision relied primarily on Santobello v. New York, 404 U.S. 257, and in New York the Santobello decision has been extended from addressing only promises made by prosecutors to those made by judges. People v. Selikoff, 35 N.Y.2d 227 (1974).

In Palermo, the Court of Appeals for the Second Circuit relied on the following principles:

- (1) "Santobello requires relief when the prosecutor fails to fulfill promises within his power made in negotiating a plea bargain." (citations omitted) at 296.
- (2) "Fundamental fairness and public confidence in government officials require that prosecutors be held to 'meticulous standards of both promise and performance'. Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973)." at 296.

After substituting the words 'trial judge' for "prosecutor" above, based on the authority of Selikoff, supra, it is apparent that the proper duties of trial judge in relation to the promises made to Murello in plea negotiations were not fulfilled since the trial judge imposed a sentence which had not been agreed to by both parties. While under the circumstances it may be considered reasonable for the court not to keep its promise as to no incarceration upon reliance on the intervening circumstance that Murello had again been arrested,* the trial judge violated the principle of fairness in holding Murello to his guilty plea and imposing a wholly unbargained for sentence.

In Santobello, the Supreme Court listed the possible remedies where the promise to the defendant was not kept as either specific performance of the agreement or vacatur of the plea. 404 U.S. at 263. "Where appropriate, the courts have not hesitated to mandate specific performance of the agreement. Correale v. United States 479 F.2d 944 (1st Cir. 1973); Harris v. Superintendent, Va. State

* It may be argued that this circumstance is not reasonable in that a mere arrest should not be taken as evidence of any guilty conduct. In fact the indictment following this arrest was later dismissed.

Penitentiary, 518 F.2d 1173 (4th Cir. 1975)" Palermo v. Warden,
Green Haven Station Prison, 545 F.2d 286, 297 (2d Cir. 1976).

Therefore, based on the principles of fairness, equal protection and due process, the agreement made by the trial judge to impose a fine and sentence Murello to probation should be specifically enforced or in the alternative the court should order that Murello's petition for a writ of habeas corpus and remand the case for further proceedings in the state courts.

POINT III

IN THE ALTERNATIVE, THE GUILTY PLEAS ON
CONDITION WERE INVOLUNTARY SINCE THE CONDITION
IMPOSED BY THE TRIAL JUDGE THAT MURELLO NOT BE
ARRESTED BETWEEN THE TIME OF HIS PLEA AND
SENTENCING WAS NEVER COMMUNICATED TO HIM.

While it is clear from the Sentencing Minutes (A-15-17) that the trial judge's promise of no incarceration to ensue from a plea of guilty was meant to be conditioned on the fact that Murello not be arrested before the imposition of sentence, it also appears that Murello was not made aware of the condition (petitioner's affidavit, Exhibit C, p.2). Murello, in fact, believed the agreement was absolute: in exchange for his plea of guilty he would receive a fine and a suspended sentence.

To quote from Mr. Justice Douglas' concurring opinion in Santobello v. New York, 404 U.S.257: "a guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond all reasonable doubt" and "'unfairly obtained' guilty pleas in the federal courts ought to be vacated" (at 264, citations omitted).

While it is clear that under certain previously litigated circumstances a guilty plea must be vacated,* it should also be apparent that where a material portion of the plea bargain agreement

* I.e. where physical harm is threatened, Waley v. Johnston, 316 U.S. 101, where the use of false testimony is threatened, ibid., where additional prosecution is threatened, Machibroda v. United States, 368 U.S. 487, or where defendant is not informed of his right of counsel, Walker v. Johnston, 312 U.S.275.

was not communicated to the defendant his plea of guilty may be characterized as unfairly induced or deprived of the "character of a voluntary act", Machibroda v. United States, 368 U.S.487 at 493.

Similarly where a defendant pleaded guilty in reliance on an unkept representation of his attorney it was held error for the district court to deny the petition for habeas corpus without conducting an evidentiary hearing to determine the truth of what defendant alleged. Allison v. Blackledge, 533 F.2d 894 (4th Cir. 1976); Cert. gtd 97 S. Ct. 379 (1976).

Therefore, the judgment of dismissal should be reversed and the case remanded for an evidentiary hearing on the ground that the pleas were given involuntarily.

CONCLUSION

THE JUDGMENT OF DISMISSAL SHOULD BE REVERSED AND
THE PETITION FOR A WRIT OF HABEAS CORPUS SHOULD
BE GRANTED.

Dated: March 15 , 1977

Respectfully submitted,

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